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Supreme Court, U.S.
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No. 00-737

IN THE
SUPREME COURT OF THE UNITED STATES

HERBERT P. RUSSELL, Petitioner

v.

CAPITAL ONE BANK, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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6 pp

QUESTIONS PRESENTED

1. Should the Court's holding that there is no absolute due process right to counsel in civil cases in Lassiter v. Dept. of Social Services, 452 U.S. 18, be reconsidered?

2. Whether the district court abused its discretion in failing to grant petitioner's motion under Fed. R. Civ. P. 60 to reverse its decision to award summary judgment on the civil counterclaim and dismiss his complaint.

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In its Brief in Opposition the respondent stated:

> This is yet another case where the federal courts have gone to extraordinary lengths to give a pro se plaintiff, who thoroughly misunderstands the law and has an unrealistic view of the facts, his day in court.
>
> Mr. Russell had ample opportunity to present to the District Court any evidence to support a valid claim, and he failed to do so.
>
> ...and the record reflects that it (the District Court) gave a full

> and fair reading to all of Mr. Russell's voluminous pleadings and motions.

See Respondent's Brief at page 12.

Petitioner most respectfully disagrees. The Sixth Circuit Court of Appeals asked Russell to answer five questions pertaining to incorrect facts, wrong law(s), the judgment, remedies, and his appeal which he answered fully. The Circuit Court stated:

> He (Russell) instead maintains that Capital One's agreement not to change the servicing of his account bound Capital One to a two percent rate for minimum monthly payments, rather than the three percent rate adopted by Capital One in December 1997.

See Petitioner's Appendix A at A3.

In Russell's Answer to Capital One's Counterclaim, which was filed on its due date February 10, 1999 due to the implicit denial of an extension of time, it included a copy of Capital One's November 19, 1997 letter to Russell. It stated:

> We would like to take this opportunity to apologize for the confusion concerning the required payment on your account. The following explanation should clarify your questions.
>
> ...The minimum payment due <u>will be</u> 2% of the new balance... (emphasis added)

The respondent incorrectly argues that Russell was properly notified in October 1997 that the payments would be increased in December to 3%. The evidence Russell submitted to the District Court clearly refutes same. The District Court stated:

> ...the defendant sent the plaintiff a letter dated November 19, 1997 apologizing for any confusion along with a statement that the monthly payment is determined by the outstanding balance for each billing period and that the minimum was 2% of the new balance. (emphasis added)

See Petitioner's Appendix B at B6.

Therefore the District Court incorrectly stated that the payment was instead of will be 2% after November 19, 1997. Therefore, when Capital One changed the payment rate from 2% to 3% it violated the Customer Agreement it relied on in its arguments with respect to giving sufficient notice of any allowable changes.

See Respondent's Brief at page 9.

The only realistic view of the facts above is that Capital One breached the contract not Russell. Russell had a valid claim and did present evidence supporting same. A full and fair reading should not have resulted in a summary judgment for Capital One.

Respondent alleges that Russell's pleadings and motions were "voluminous." If that is true how was the District

Court able to reach a decision in seven hours encompassing 23 pages?

See Petitioner's Statement at page 4.

Petitioner sincerely believes the issues raised by both parties warrant this Court's granting the petition for writ of certiorari. Even though a pro se civil federal defendant may not be a pauper does not mean he can afford counsel. A citizen's meaningful opportunity to be heard, defense, and due process rights should not be determined by the marketplace.

The District Court did not properly dismiss petitioner's claims after a careful review of the facts and the law.

DATED: December 11, 2000

Respectfully submitted,

HERBERT P. RUSSELL
Petitioner